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January 26, 1998

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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JAN 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Implementation of Section 309(j) of the Communications Act --
Competitive Bidding for Commercial Broadcast and Instructional
Television Fixed Service Licenses (MM Docket No. 97-234)

Dear Ms. Salas:

Transmitted herewith for filing with the Commission on behalf of the Indiana Higher Education Telecommunications System is an original and four copies of Comments to the above-captioned Notice of Proposed Rulemaking.

An additional "File Copy" of the Comments for our records has also been included. Please date-stamp this "File Copy" and return it to our messenger.

Should there be any questions regarding this matter, please communicate with this office.

Sincerely,



Bradley S. Albert

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
)
Implementation of Section 309(j) of)
the Communications Act -- Competitive)
Bidding for Commercial Broadcast and)
Instructional Television Fixed Service)
Licenses)
_____)

MM Docket No. 97-234

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS

Pursuant to Section 1.415 of the Commission's Rules, the Indiana Higher Education Telecommunications System ("IHETS"), by its undersigned attorneys, hereby files these comments in response to the Notice of Proposed Rulemaking, FCC 97-397 (released November 26, 1997) in the above-referenced docket.

IHETS is a consortium of public and private institutions of higher education in Indiana, which provides various telecommunications network services shared by the member institutions, including formal, for-credit instruction leading to the award of diplomas and/or degrees to enrolled students. The IHETS network, which consists of 29 Instructional Television Fixed Service ("ITFS") stations, transmits credit courses, noncredit courses, and continuing education programming from any of seven major college campuses to receive sites located in each of Indiana's ninety-two counties.¹

¹ Twenty-five of these ITFS stations are licensed to the Trustees of Indiana University and four are licensed to the Trustees of the Vincennes University on behalf of the IHETS consortium.

These comments address the proposal in the NPRM to apply competitive bidding procedures to mutually-exclusive ITFS applications. NPRM, ¶¶ 98-100. As the Commission points out, in the Balanced Budget Act of 1997, Congress expanded the authority of the Commission to award radio licenses by auction. NPRM, ¶ 1. In so doing, Congress provided three explicit exemptions to auction proceedings: (1) public safety station licenses; (2) digital television station licenses; and (3) non-commercial, educational broadcast station licenses as defined in Section 397(6) of the Act. See 47 U.S.C. § 309(j). The Commission notes that none of these exceptions explicitly covers ITFS licenses. NPRM, ¶ 98.

Mutually-exclusive ITFS applications may arise from new station proposals and applications for major changes to authorized stations. See 47 C.F.R. § 74.911. The institutions that represent IHETS are current ITFS license holders and potential future applicants for additional ITFS licenses or modifications to existing stations. Accordingly, IHETS has a substantial interest in the outcome of this proceeding.

I. The Commission's Policies Governing ITFS Are Inconsistent with Competitive Bidding for Mutually-Exclusive Applications.

For the past 30 years, the Commission has reserved the ITFS spectrum for instructional use, the only radiofrequencies designated for such services in the United States.² The Commission has reiterated throughout this period that the

² See Educational Television, 39 FCC 846 (1963), recon. denied, 39 FCC 873 (1964).

purpose of the ITFS frequency allocation is "to provide for the licensing of transmitting facilities to send visual and accompanying aural instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students."³ Because these frequencies have been provided to eligible entities at no charge, ITFS licensees have been able to focus their resources on developing and improving educational opportunities and experiences of students and professionals.

IHETS is concerned that the proposal to offer ITFS spectrum to the "highest bidder" will erode the instructional purpose of ITFS and result in the increased commercialization of the spectrum. The need for funds to finance participation in an auction may encourage applicants and licensees to shift their focus from the instructional programming for which the spectrum is allocated. For example, they may implement programming which will return a profit in order to support their investment in the spectrum. Alternatively, ITFS applicants may pursue funds from commercial wireless cable lessees at the cost of limiting airtime for instructional use.

Moreover, IHETS submits that application of competitive bidding to ITFS licenses is inconsistent with the policies underlying the ITFS licensing system. In commercial licensing proceedings, such as PCS or LMDS, the service to be provided to the public is likely to be substantially similar regardless of which company acquires the license. Applicants for these radio services place different

³ Id. at 852-53.

values on a license depending upon their ability to offer efficient and competitive service and their ability to obtain financing. By awarding licenses to those who value them most highly, a competitive bidding licensing scheme encourages the rapid deployment of new technologies and services and promotes the efficient use of the spectrum.⁴

In contrast, the grant of an ITFS license to the "highest bidder" does not simply select the most efficient provider of a service. Rather, it determines which type of service will be offered and to whom. Unlike their commercial counterparts, competing ITFS applicants intend to use the spectrum to offer a unique schedule of instructional programming designed to meet the needs of their students. For example, applicants for a specific ITFS frequency might include a school district which proposes to use the spectrum to provide formal instruction to enrolled students as well as a national organization which seeks to use the same frequencies to provide instructional programming to students in adult education programs. The award of the ITFS license determines not only which applicant may provide service, but how the spectrum is used. The Commission currently has in place a process for comparative review of mutually-exclusive ITFS applications. See 47 C.F.R. § 74.913. This procedure makes some effort to

⁴ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 75 RR 1, 8 (1994).

evaluate the "public interest" associated with the applicants' educational proposals which is an integral aspect of the spectrum. A system of competitive bidding would make these public interest factors irrelevant.

II. The Commission Is Not Required To Auction Mutually-Exclusive ITFS Applications.

In the NPRM, the Commission seeks comment on whether it is required to apply auction rules to mutually-exclusive applications for ITFS stations in light of the recent amendments to Section 309(j) of the Communications Act. As noted above, there is no express exemption for ITFS stations in the Commission's expanded competitive bidding authority.⁵ See NPRM, ¶¶ 98-101.

IHETS submits that the absence of such an exemption does not impose an obligation on the Commission to apply competitive bidding policies to ITFS. Rather, it is well recognized that a statute should not be interpreted to accomplish an absurd or illogical result.⁶ In this case, awarding ITFS licenses by auction would establish an absurd licensing scheme for non-commercial, educational stations. Moreover, although infrequently applied, courts have recognized that exceptions may be found in statutory provisions where such an interpretation is

⁵ See 47 U.S.C. § 309(j), as amended by the Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997).

⁶ See National Treasury Employees Union v. United States Merit Sys. Protection Bd., 743 F.2d 895, 914 (D.C. Cir. 1984); Bechtel Constr. v. United Bhd. of Carpenters, 812 F.2d 1220, 1225 (9th Cir. 1987) ("Legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious").

reasonable and necessary to avoid overturning a sound rule of public policy or to avoid absurd and manifestly unjust consequences.⁷ This proceeding presents the right case for application of these principles. As explained above, using auction rules for award of ITFS licenses would erode the essential educational character of ITFS. It would be absurd to infer from the omission of a specific statutory exemption an intent by Congress to threaten the long-standing reservation of this spectrum for instructional purposes.⁸

In addition, IHETS submits that the Commission should consider the exemptions which Congress did include. Congress expressly provided an exemption for non-commercial educational broadcast stations, as defined in 47 U.S.C. § 397(6). See 47 U.S.C. § 309(j)(2). According to the Commission, ITFS does not fall within the Section 397(6) exemption because it is not a broadcast service. See NPRM, ¶ 99. However, like non-commercial broadcast stations, ITFS licensees use their spectrum to provide non-commercial and non-profit educational programming. The Commission should consider whether Congress' reference to Section 397(6) entities was intended to exclude ITFS stations or whether Congress intended to create an exemption to include all non-commercial educational

⁷ See, e.g., Del Mar v. Caspe, 272 Cal. Rptr. 446 (Cal. App. 6 Dist. 1990); Kempf v. Michigan Bell Tele. Co., 358 N.W.2d 378, 383 (Mich.App. 1984).

⁸ The legislative history of the 1997 Balanced Budget Act suggests that the omission of an auction exemption for a particular service should not necessarily be construed by the Commission as an endorsement by Congress to auction licenses in that service. See H.R. Conf. Rep. No. 105-217 at 572, reprinted in 1997 U.S.C.C.A.N. at 193.

stations. Certainly, there is nothing in the 1997 statute or its legislative history to suggest that Congress expressly decided to abandon its previous judgment that ITFS, like other non-commercial educational services, should be exempt from competitive bidding policies.⁹

Finally, given the lack of clarity in the revised Section 309(j) and the policy reasons for not awarding ITFS licenses by auction, IHETS requests that the Commission seek a clarifying amendment from Congress to exempt ITFS from competitive bidding with language that mirrors the exemption for ITFS stations from application fees in Section 1.1114(e)(4).

⁹ H.R. Conf. Rep. No. 103-213 at 481-82, reprinted in, 1993 U.S.C.C.A.N. at 1170-71.

CONCLUSION

For the reasons outlined above, IHETS submits that the Commission is not required to, and should choose not to, apply competitive bidding to mutually-exclusive ITFS applications.

Respectfully submitted,

INDIANA HIGHER EDUCATION
TELECOMMUNICATIONS SYSTEM

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Date: January 26, 1998